b.) Remarks

Claims 1-4, 6-13 are pending in this application. Claims 1, 6 and 10 have been amended in various particulars as indicated hereinabove. Claims 5, 14-15 were canceled without prejudice.

Turning now to the merits, Claims 1-15 were rejected under 35 U.S.C. 103(a) over Opsal et al. (USPN '661B1) and in view of Shchegrov (USPN '892 B2). This rejection is respectfully traversed for the following reasons.

For an obviousness rejection to be proper, the Patent Office must meet the burden of establishing a prima facie case of obviousness. The Patent Office must meet the burden of establishing that all elements of the invention are disclosed in the cited publications, which must have a suggestion, teaching or motivation for one of ordinary skill in the art to modify a reference or combined references[1]. The cited publications should explicitly provide a reasonable expectation of success, determined from the position of one of ordinary skill in the art at the time the invention was made[2].

In particular, the Patent Office wrote in the final Office Action that it is the position of the Office that Opsal indeed does disclose comparing measured curve shape parameters to tabulated (theoretical) curve shape parameters..."

Applicants respectfully assert that Opsal does not disclose curve shape parameters, and that the amendment introduced to independent Claims 1, 6 and 10 particularly points out that difference between the present invention and the disclosure in Opsal. Col. 3, lines 31-40 of Opsal cited by the Patent Office discloses a theoretical model of a structure that is rectangular – "This initial model preferably has a single height and width defining a rectangular shape" (Col. 3, lines 33-34). In Opsal the initial model is rectangular, then trapezoid, if another approximation is needed etc. This is so, because Opsal characterizes periodic structures of the type shown in Fig. 1, and doesn't

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[1] In re Sang Su Lee, 277 F.3d 1338, 61 USPQ2d 1430 (Fed. Cir. 2002).
[2] In re Fine, 5 U.S.P.Q.2d 1596, 1598 (Fed. Cir. 1988); In re Wilson, 165 U.S.P.Q. 494, 496 (C.C.P.A. 1970).

deal with the measured or analysis spectra as claimed in Claims 1, 6 and 10 of the present invention. (Note that the comparison in Opsal is between the calculated intensities and the measured normal intensities, not the parameters which are characteristic of the curves of the shape of the spectra themselves).

To particularly point out that difference, Claims 1, 6 and 10 were amended to specify that the optical measured spectra and analysis spectra are curved shaped. The Claims already specify that the curve shape parameters of such curved spectra (curve shape parameters) of are used in determination of the optical parameters of a layer stack. No such elements are disclosed in Opsal and its combination with Shchegrov. It is respectfully asserted that independent Claims 1, 6, and 10 are non-obvious under 35 USC 193(a) over the combination of Opsal in view of Shchegrov.

Claims 2-4, 7-9 and 11-13 depend off Claims 1, 6 and 10, respectively and are non-obvious under 35 USC 193(a) over the combination of Opsal in view of Shchegrov.

Applicants believe that the present application is in condition for allowance. A Notice of Allowance is respectfully solicited. Should any questions arise, the Examiner is encouraged to contact the undersigned.

Respectfully submitted,

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